Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-1014

DALE FOLTZ,

Petitioner,

v.

WILLIAM BLACKBURN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

MARTIN A. GEER (P27565)
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COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHETHER THE DECISION OF THE COURT OF APPEALS WHICH CLEARLY FOLLOWED THE PRINCIPLES OF STRICKLAND v WASHINGTON, 466 U.S. 608 (1984), PRESENTS ANY REASONS SUPPORTING THE GRANTING OF THE WRIT?

JURISDICTION AND APPLICABLE PROVISIONS OF LAW

Respondent accepts Petitioner's statement regarding jurisdiction and the constitutional provision at issue. Respondent notes that the decision below relied upon Strickland v Washington, 466 U.S. 668, (1984) as well as Kimmelman v Morrison, ___ U.S. ___, 106 S. Ct. 2574 (1986) and other opinions cited therein.

COUNTERSTATEMENT OF THE CASE

Respondent submits that a full statement of the procedural history and the facts is set forth in the thoroughly written opinion of the unanimous panel of the Sixth Circuit Court of Appeals. Blackburn v Foltz, 828 F. 2d 1177 (6th Cir. 1987). For the sake of brevity, Respondent will not reiterate that factual statement here. Respondent notes, however, that Petitioner's Statement of Facts liberally makes reference to a record which was not presented by Petitioner to the U.S. Court of Appeals. Further, some references to facts were never part of the record before any court involved in this case.

For example, Petitioner states:

> "In this connection, it should be noted that the Sixth Circuit took pains to point out that Joe May's conviction was reversed by the Michigan Court of Appeals and he was not retried. (App B, B-3 n 1) What the Sixth Circuit doesn't note is that following the reversal on July 7, 1978, May wasn't retried because he instead pled guilty on May 29, 1979, and was sentenced to 7 to 11 years imprisonment on June 25, 1979. Thus the Sixth Circuit suggests that the case against May fell apart when in reality, the prosecution never even had to conduct another trial."
>
> Petitioner's Brief at p. 12

There is no reference to the record for this assertion as it is not in

any record before any court regarding this case. In addition, Respondent submits that this issue was entirely immaterial to the courts on appeal's decision below. What the record reflects, which Petitioner omits, is that at the evidentiary hearing before the U.S. District Court, Joe May testified that he did commit the robbery for which Respondent was convicted and that Respondent was not involved in that crime. EH Transcript, pp. 32-40 "I never saw Blackburn that day at the time of the robbery." Id. at 40

ARGUMENT

I

THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE RECENT DECISIONS OF THIS COURT AND THE OTHER CIRCUITS

Regarding the Sixth Amendment issue of ineffective assistance of counsel, Petitioner asserts essentially three reasons supporting their request for granting the writ: 1) unanimous panel of the Sixth Circuit Court of Appeals was wrong and the newly assigned U.S. District Court judge was right; 2) the Sixth Circuit failed to follow this Court's opinion in Strickland v Washington 466 U.S. 668 (1984); 3) the Sixth Circuit opinion is inconsistent with another circuit's application of Strickland. Respondent will briefly respond to these assertions.

First, Respondent does not deem it necessary nor even appropriate to simply reargue here the position he took before the U.S. Court of Appeals for the Sixth Circuit. The very thorough analysis of the record and the law by the unanimous panel of the Sixth Circuit can well stand on its own in response to Petitioner's arguments in this Court. Respondent's state trial counsel's egregious errors included: 1) failure to investigate and produce known alibi witnesses; 2) clearly erroneous advice on the record precluding Defendant from

taking the stand on his own defense reflecting a "startling ignorance of the law" (828 F. 2d at 1182); and 3) his failure to obtain the first trial transcript of the equivocal testimony of one eye witness.[1] Blackburn v Foltz, 828 F. 2d 1177 (6th Cir. 1987). The details need not be reiterated here.

Secondly, Petitioner claims that the Sixth Circuit failed to follow this Court's ruling in Strickland v Washington, 466 U.S. 668 (1984). Even a cursory review of the opinion below reflects that the Sixth Circuit strictly applied the Strickland test to every claim of error addressed. The Sixth Circuit Court consistently applied the presumptions and deference princples of Strickland. See Blackburn v Foltz, supra.

Third, Petitioner makes reference to the U.S. v Debango 780 F 2d 81 (D.C. Cir. 1986) decision in a very weak attempt to show that the Sixth Circuit misapplied the Strickland standards. The underlying facts in Debango are not even close in comparison to the case at bar. In Debango, the Defendant pled guilty. The Defendant then claimed that his counsel failed to locate witnesses in his defense and that his counsel slept through much of the trial. Id. at 86. The D.C. Circuit was troubled by the allegations stating:

> "Counsel's failure to interview the proposed witnesses is troublesome. Had trial counsel interviewed the witnesses, his decision not to call them might be protected from an ineffective assistance claim as a tactical litigation decision. The complete failure to investigate potentially corroborating witnesses, however, can hardly be considered a tactical decision. As the Supreme Court noted in Strickland, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 104 S.Ct. at 2066.
>
> Id. at 85

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1. The Sixth Circuit also noted that the state trial counsel's testimony in the evidentiary hearing before the U.S. District asserting that he attempted to obtain the first trial transcript was in direct conflict with his statements on the record before the state trial court. 828 F. 2d at 1184 n3.

However, the D.C. Circuit upheld the conviction as the appellant there failed to introduce any evidence in the district court to support his claims that he was prejudiced by the alleged error or that his counsel slept through the trial. Id 86 In the case at bar, Respondent provided ample evidence of the prejudice suffered as a result of his counsel's errors. See Blackburn v Foltz supra.

The Petitioner has presented no arguments of substance which support the granting of the writ in this case.

The first state trial resulted in a jury unable to reach a verdict regarding Respondent's guilt or innocence. At the second trial, Respondent was denied every opportunity to present his defense by his own counsel. Respondent only seeks the opportunity to have a trial in which he is permitted to defend against charges. He has diligently pursued efforts to receive a fair trial and prays that this trial be delayed no longer.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari and allow Respondent to be retried on the charges Petitioner has brought in the state court.

Respectfully submitted,

Dated: 2-19-88

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss:
COUNTY OF WASHTENAW)

Martin A. Geer, being first duly sworn, deposes and says that on the 16th day of February, 1988, he served two copies of Richard H. Browne, Assistant Prosecuting Attorney, 1200 N. Telegraph Road, Pontiac, Michigan 48053 by placing the same in an envelope bearing sufficient first-class postage addressed to said person at the above address, and placing the same in a U.S. mail receptacle on said date.

MARTIN A. GEER

SUBSCRIBED AND SWORN to before me
this 16th day of February, 1988.

Karen L. Roberts, Notary Public
Wayne County, Michigan, acting in
Washtenaw County, Michigan
My commission expires: 7/7/90